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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

VICTOR ROSARIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was appellant's arrest illegal because it was made without probable cause?

2. Was the evidence seized from the appellant and his apartment the fruit of an illegal arrest?

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IN THE
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VICTOR ROSARIO,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Victor Rosario, by his counsel Mel A. Sachs, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York (Bramwell, J.) convicting petitioner after a plea of guilty of knowingly and intentionally possessing, with intent to distribute, a quantity of cocaine.

OPINION BELOW

The opinion of the Court of Appeals (Van Graafeiland and Newman, J.J.) (Goettel, dissenting)* (App., *Infra*) is not yet reported. The decision of the Court of Appeals denying rehearing or rehearing en banc was filed Dec. 23, 1980 (App., *infra*).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on Novembe 3, 1980. A timely petition for rehearing with a suggestion of rehearing en banc was denied on December 23, 1980. A copy of the order denying the petition for rehearing appears in the appendix hereto. This court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

United States Constitution—Amendment IV.

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* Hon. Gerald L. Goettel, District Judge of the Southern District of New York, sitting by designation.

STATEMENT OF THE CASE

The Appellant, Victor Rosario, was charged in a two count indictment with conspiracy to possess cocaine with intent to distribute, and possession of cocaine with intent to distribute. Prior to trial Victor Rosario moved to suppress evidence seized from him at his arrest and to suppress evidence seized during a later search of Rosario's apartment. On July 16, 1979, a hearing was held on the motion.

THE SUPPRESSION HEARING

Special Agent Stuart Stromfeld of the Drug Enforcement Agency testified that he observed Victor Rosario at 11:00 o'clock on the night of May 3, 1979 (42-43).* The night was dark (66); and it may have been raining (44). Stromfeld saw Rosario leave 83-16 Vector Avenue, cross the street, open the door of a car, and sit down in the front passenger seat (7, 65). Rosario was cupping something in his hand, but Stromfeld did not know what it was (45).

Stromfeld gave inconsistent testimony concerning his location in relation to the car. He testified, variously, that he was in a doorway next to the car (7, 43, 47) and that he was diagonally across the street from the automobile (43).

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* Numbers in parenthesis refer to page numbers in the minutes of the proceedings of July 16, 1979, which involved the Suppression hearing.

When Rosario started to enter the car Stromfeld walked with gun drawn and badge out (51, 66-68) to the left rear window of the vehicle and peered in (7-8). Stromfeld initially testified that he saw Rosario holding a plastic bag, resembling a sandwich baggie, which contained white powder (8, 11). Stromfeld testified that cocaine takes the form of a white powder, and that it is often packaged in clear plastic bags or similar containers (9). Stromfeld then retracted his original testimony that the bag's contents were powder. Now he testified that the bag contained mostly round lumps—four or five—like camphor balls (11, 12). He later testified he could not tell exactly whether the contents of the bag were a powder (73). Stromfeld explained, "in my experience I thought it was white. But it could have been a light tan or a light yellow or it could have been many different colors" (73).

Stromfeld testified that he saw Rosario show the bag to the driver of the car (68). At that point Stromfeld was ready to make the arrest (68). He signaled to another agent and raised his gun and badge (67). Rosario then turned around to show the bag to the man in the back seat (8). When he turned around, Rosario saw Stromfeld standing at the window. Stromfeld testified that Rosario's observation of him with gun drawn and badge out, signaled the arrest (51). The arrest was based on the single observation by Stromfeld of Rosario (73).

Stromfeld ordered Rosario to stop (8). Stromfeld was then joined by three other agents, and they opened the car door (8). When the door opened, Rosario put the bag between his legs (9). The agents removed the three occupants from the automobile (8, 49), ordering Rosario to raise his hands and spread his legs. As Rosario spread his legs, the bag fell out (9). Rosario was then handcuffed (59).

Stromfeld gave Rosario the Miranda warnings and asked where he got the cocaine (54). Rosario said he wanted to cooperate with the government (14). In response to Stromfeld's questions Rosario said that the substance in the bag was cocaine which he had obtained at an apartment at 83-16 Vector Avenue from a person named Bonnett (14-15).

Rosario, under further questioning, said he had an apartment with two roommates and occasionally stayed with his mother (15). Stromfeld told Rosario that he wanted to look in Rosario's apartment, and might want to see Rosario's mother's apartment (15).

Stromfeld, with two other agents, took Rosario to the apartment on Vector Avenue, where they remained fifteen or twenty minutes (54-55). The three agents then took Rosario to his own apartment building (16, 56). Other agents were already present at the building (57). Rosario, in handcuffs, had difficulty getting his keys. The agents called out for help, and a woman opened the front door for them. Rosario opened a locked foyer door with his own keys. The agents saw another door, which was open, at the top of a stairway (16-17). All the agents went up the stairs and entered Rosario's apartment with guns drawn (17, 59). The agents went through the apartment and found a controlled substance which became the subject matter of this indictment.

After Judge Bramwell's denial of the motion, the Appellant pleaded guilty to count two of the indictment, the substantive count. Count two charged possession of cocaine with intent to distribute (134). The prosecutor and defense counsel stated on the record that the defendant, in pleading guilty, reserved his right to appeal the decision on the suppression hearing (132).

REASONS FOR GRANTING THE WRIT

POINT I

APPELLANT'S ARREST WAS ILLEGAL BECAUSE IT WAS MADE WITHOUT PROBABLE CAUSE

Agent Stromfeld testified that his arrest of Rosario was based on his own single observation of Rosario (73). The observation was made at 11:00 o'clock (42-43) on a dark night (66) when it may have been raining (44). The observation was made through the rear window of a car (7-8) and was of a passenger in the front seat (7, 65). Stromfeld first testified that he saw Rosario holding a plastic bag containing white powder (8-11). Then retracting his original testimony, Stromfeld testified that the bag contained mostly round lumps resembling camphor balls (11-12). Finally, Stromfeld testified that although he thought he saw white powder "it could have been a light tan or a light yellow or it could have been many different colors" (73).

Rosario was under arrest as soon as he saw Stromfeld at the car window with gun drawn and badge displayed (51). Stromfeld's observations up to that point fail to provide probable cause; his post-arrest observations are irrelevant.

Stromfeld himself testified that he based the arrest on his observation of the bag in Rosario's hand (73). The evidence at the hearing discloses no other basis for an arrest, notwithstanding the fact that, according to the court's findings, the agents had Rosario under surveillance during the day (112).

Of itself, the observation that an individual possesses white powder in a plastic bag fails to provide probable cause to arrest. See, *United States v. Commissiong,* 429 F. 2d 834 (2d Cir. 1970); *United States v. Moon,* 351 F. 2d 464 (2d Cir. 1965), *cert. denied* 383 U.S. 929 (1966); *United States v. Devenere,* 332 F. 2d 160 (2d Cir. 1964); *People v. Oden,* 36 N.Y. 2d 382 (1975).

In the present case the record is barren of any fact to support an arrest other than Stromfeld's naked observation of the plastic bag. There is no evidence that the agents had any advance information or tip that a drug transaction was impending. No money was transferred or displayed in the car. There is no evidence that the arrest took place in a high crime area, or that the police knew that the address on Vector Avenue which Rosario visited was a drug location. No information was presented concerning the two men other than the defendant who were in the car. The bag in question was plastic, not glassine. Plastic bags have numerous legitimate uses. Glassine bags, on the other hand have been described by courts, as telltale of drugs. Nevertheless, the transfer of glassine envelopes, even in a high crime area, without additional behavior is insufficient to establish probable cause for arrest. See, *People v. Davis,* 36 N.Y. 2d 280 (1975); *People v. Bryant,* 37 N.Y. 2d 208 (1975). Possession of a plastic bag is insufficient to demonstrate criminal conduct, and there is no probability that white powder will be cocaine. See, *People v. Nadel,* 390 N.Y.S. 2d 131, 131-132, (2d Dept. 1976).

In any case, Stromfeld retracted his testimony that he saw white powder in the plastic bag (11-12). Stromfeld's corrected testimony was that the bag contained white round lumps (11-12). They could have been camphor balls. On the basis of Stromfeld's testimony they could have appeared equally to be white mint balls. Stromfeld later testified that he couldn't tell what was the color of the substance in the plastic bag. Hc testified, "it could have been many different colors" (73).

After Stromfeld corrected his testimony, there was a lack of evidence that he saw white powder in the bag. Therefore Stromfeld's testimony, that cocaine takes the form of a white powdery substance (9), loses its relevance. Consequently, there is no evidence in the record that Stromfeld had any factual basis at all for his belief that the plastic bag contained cocaine. Thus, the Court's finding that Stromfeld had probable cause to arrest is unsupported by evidence in the record.

What is involved here is not only a question of probable cause, but of how little evidence the government can introduce to justify a warrantless arrest and still survive a suppression hearing. Stromfeld's testimony contained many inconsistencies, not only about the appearance of the substance in the bag (8-12, 73) but also about Stromfeld's location with respect to the car (7, 43, 47). Furthermore, Stromfeld's testimony, that at 11:00 P.M. (42-43) on a dark night (66) looking through the rear window of a car, he could identify the contents of plastic bag held by a front seat passenger (7-12) lacks plausibility. The Federal Appellate Courts have a duty to protect the legitimacy of the Federal criminal justice system by ensuring that convictions not be based on evidence of federal agents which is of a dubious nature.

The ruling of the District Judge should be reversed because as a matter of law the agent's observations of a plastic bag did not furnish probable cause. Further grounds for reversal are that the District Court's findings are unsupported by evidence in the record and that the testimony of the agent was incredible as a matter of law.

POINT II

THE EVIDENCE SEIZED FROM THE APPELLANT AND HIS APARTMENT WAS THE FRUIT OF AN ILLEGAL ARREST

Evidence seized by exploitation of an illegal arrest must be excluded. *Wong Sun v. United States,* 371 U.S. 471 (1963); *Brown v. Illinois,* 422 U.S. 1053 (1975); *Dunaway v. New York,* 99 S. Ct. 2248 (1979); *United States v. Tucker,* Docket No. 79-1068 slip. op. 5211 (2d Cir. October 23, 1979).

The rule applies both to tangible evidence and to statements. Whether exclusion is required depends on whether,

> "granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary tain." *Wong Sun v. United States,* supra 371 U.S. at 448, quoting Maguire, *Evidence of Guilt,* 221 (1959).

In the present case the plastic bag fell on the ground at the arrest, when the agents ordered Rosario to spread his legs (9). The plastic bag was obtained directly from the illegal arrest. It is not arguable that there was attenuation.

Stromfeld gave Rosario the Miranda warnings at arrest and immediately began to question Rosario (54). Rosario made inculpatory statements (14-15). *Brown v. Illinois, supra,* held that Miranda warnings themselves do not purge the taint of an illegal arrest.

> "Miranda warnings . . . do not alone sufficiently deter a Fourth Amendment violation.
>
> Thus even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains" *Brown v. Illinois, supra* at p. 680-681.

Brown v. Illinois, supra, established a three fold test for determining whether a confession was obtained by exploitation of an illegal arrest.

> "The temporal proximity of the arrest and the confession; the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." Ibid at 603-604 (footnotes omitted).

In the instant case the government obtained tangible evidence as well as statements. The principle of the exclusionary rule applies to both classes of evidence. See *Wong Sun v. United States, supra; Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920). Consequently, the criteria established by *Brown v. Illinois, supra,* for the attenuation of taint are applicable to the present case.

In the present case the temporal proximity was much closer than it was in *Brown v. Illinois,* where approximately an hour intervened between the arrest and the defendant's first statements. In the present case Rosario began to talk almost at once. Furthermore, there were no intervening circumstances at all between the illegal arrest and Rosario's inculpatory statements. The government immediately and energetically exploited the illegal arrest by taking Rosario forthwith to the apartment at 83-16 Vector Avenue, where, he admitted, he had obtained cocaine (54-55). Fifteen or twenty minutes later the group of agents left Vector Avenue and took Rosario to his own apartment.

The agents gave Rosario no respite. Rosario's landlady testified she saw the agents with Rosario at her building at 11:00 p.m. (80-81). According to Agent Stromfeld, the arrest itself took place at approximately 11:00 p.m. (42-43). The time intervals were short. The exploitation of the illegal arrest was continuous and energetic. The agents gave Rosario no time to think, and continued questioning him at his own apartment (26-30).

The agents used the illegal arrest as a lever to achieve increasingly invasive intrusions on Rosario's privacy. First the agents used the evidence secured at the arrest itself as a means to force Rosario to "cooperate" (14). Later, in Rosario's apartment, the agents asserted they had a basis to seek search warrants if Rosario failed to consent to a further search of the apartment (21).

In the present case the purpose and flagrancy of the police misconduct was less egregious than in *Brown v. Illinois.* Here, the words of the court in *Dunaway v. New York,* are relevant:

> "(The state court deciding *Dunaway*) purported to distinguish *Brown* on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was "highly protective of defendant's Fifth and Sixth Amendment rights" (citation omitted). This betrays a lingering confusion between "voluntariness" for purposes on the Fifth Amendment and the "causal connection" test established in *Brown.* No intervening events broke the connection and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth." *Dunaway v. New York,* 99 S. Ct. at 2259-2260.

In *United States v. Tucker, supra,* the Second Circuit stated:

> "Here, as in *Dunaway,* although the official misconduct was not egregious, the arrest and confession were very close in time, and the defendant was in continuous police custody. The issue thus turns on whether "any intervening event of significance, *"Dunaway, supra,* 47 U.S.L.W. at 4640, occurred." *United States v. Tucker, supra,* slip. op. at 5220-1.

In the present case, as in *Dunaway* and *Tucker*, "there was no intervening event of significance whatsoever." *Dunaway v. New York, supra,* 99 S. Ct. at 2259. The evidence taken from Rosario at arrest and the evidence subsequently seized in Rosario's apartment should be suppressed as the fruit of an illegal arrest.

CONCLUSION

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX A—Opinion

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 959—September Term, 1979

(Argued April 1, 1980 Decided November 3, 1980)

Docket No. 79-1356

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR ROSARIO,

Defendant-Appellant.

Before:

VAN GRAAFEILAND and NEWMAN, *Circuit Judges,*
and GOETTEL, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Bramwell, *J.*, convicting appellant after a plea of guilty of know-

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* Hon. Gerard L. Goettel, District Judge of the Southern District of New York, sitting by designation.

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ingly and intentionally possessing with the intent to distribute a quantity of cocaine.

Affirmed.

MEL A. SACHS, New York, N.Y. *for Defendant-Appellant.*

DIANE F. GIACALONE, Assistant United States Attorney (Edward R. Korman, United States Attorney for the Eastern District of New York, Miles M. Tepper, Assistant United States Attorney, on the brief), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

Appellant was convicted, after a plea of guilty in the United States District Court for the Eastern District of New York, of knowingly and intentionally possessing with the intent to distribute approximately one-eighth of a kilogram of cocaine. The cocaine was found in appellant's apartment when Drug Enforcement Administration agents searched it with his consent. At the time of the plea, it was agreed that appellant preserved his right to appeal Judge Bramwell's denial of his motion to suppress the drugs seized by the government and admissions made concurrently therewith. Basic to Judge Bramwell's denial was his finding that appellant's arrest which preceded the seizure and admissions was not unconstitutionally defective. This finding was based on a simple set of facts.

On May 3, 1979, Special Agent Stuart Stromfeld and several other DEA agents had appellant under surveillance. At approximately 11:00 p.m. Stromfeld was standing in a doorway on Vector Avenue in Queens near a parked automobile in which two men were seated. Other DEA agents were stationed nearby. While Stromfeld was so concealed, he saw appellant leave a building carrying something cupped in his hands, cross the street, and enter the parked car. Stromfeld then left the doorway and approached the car at the rear side window on the driver's side. From this position he watched while appellant showed the two men in the car what he had been surreptitiously carrying, a clear plastic bag containing a white or light-colored powder.

As appellant was displaying the bag to the man in the rear seat, he saw Stromfeld, who displayed his gun and badge at the car window. Appellant immediately concealed the bag between his legs. When he got out of the car and spread his legs in response to Stromfeld's command, the bag fell to the ground. It contained cocaine.

After being advised of his rights, appellant consented to the search of his apartment, also located in Queens. There the DEA agents saw a large sum of money and additional drugs in a bedroom and apprehended appellant's roommate who was in the apartment. Appellant and his roommate then gave written consent to a search of the apartment, in the course of which additional drugs were found. Both appellant and his roommate admitted their implication in the purchase and sale of drugs.

Challenging the legality of his arrest, appellant quarrels with the district court's finding that Stromfeld saw white powder in the plastic bag. Appellant points to testimony by Stromfeld that there were some lumps in

the bag and suggests that Stromfeld might reasonably have concluded that the bag, which was so furtively transported to the car and concealed between appellant's legs, contained camphor balls or white mints. However, Stromfeld, an agent with 12 years experience, was familiar with the white powdery appearance of cocaine, and the sum and substance of his testimony was that the contents of the bag had that appearance. Indeed, because the material in the bag was in fact cocaine, it is unlikely that it would have any other appearance. Certainly we are not prepared to hold that the district court's finding of fact was clearly erroneous.

Given this factual finding, the legality of the arrest is fully supported by the surrounding facts. A plastic bag which contains a substance that looks like cocaine, which is carried furtively to a car containing two men at 11:00 p.m., and which is displayed for inspection by the two men, is not likely to contain camphor balls or white mints. The district court did not err therefore in concluding that there was probable cause for appellant's arrest. *See United States v. Canieso,* 470 F.2d 1224, 1228 (2d Cir. 1972).

Following his arrest, appellant indicated a desire to cooperate with the police and did in fact cooperate for a period of several weeks. The district court found that appellant voluntarily consented to the search of his apartment, and that finding has ample support in the record. There was no basis therefore for suppressing the incriminating evidence uncovered during the search. *See United States v. Watson,* 423 U.S. 411, 424-25 (1976).

There is no merit in appellant's contention that there was no factual basis for his plea and that it was not voluntarily and intelligently made. Appellant admitted

that his roommate and codefendant intended to sell the drugs found in the apartment and that appellant was holding the drugs for him in the apartment. Colloquy between the district judge and appellant showed that appellant was informed concerning aiding and abetting in the commission of an offense. Appellant's plea was knowingly made and factually supported.

We likewise find no merit in appellant's contention that the district court did not comply with Rule 11 requirements, in that he failed to advise appellant that he faced a mandatory minimum jail sentence and a possible lengthy special parole term. Appellant did not face a mandatory minimum jail sentence, *see* 21 U.S.C. § 841, and he was advised that a special parole term might be for his lifetime.

The judgment appealed from is affirmed.

GOETTEL, *District Judge* (dissenting):

On the evening of May 3, 1979, appellant Victor Rosario, while sitting with two other persons in a parked car on Vector Avenue in Queens, New York, was arrested by agents of the Drug Enforcement Agency ("DEA"). During the ensuing "pat down," the agents discovered cocaine in his possession. After being advised of his constitutional rights, Rosario indicated a willingness to cooperate with the agents, informed them of the source of the narcotics, and consented to a search of his apartment. During this search the agents arrested an accomplice and discovered a large amount of cash, one-eighth of a kilogram of cocaine, and certain narcotics paraphernalia. Subsequently, both Rosario and his ac-

complice were indicted for possession with intent to distribute 150 grams of cocaine and for conspiring to do so.[1]

The Government presented only one witness, Special Agent Stuart Stromfeld of the DEA, at the customary suppression hearing. Agent Stromfeld testified that while on duty the night of May 3, at approximately 11:00 p.m., he had observed Rosario enter a building located on Vector Avenue. He stated that soon thereafter Rosario, apparently holding something cupped in his hands, left the building and entered a nearby car. Agent Stromfeld testified that he then walked up to the car on the side opposite to the side Rosario had entered and, attempting to position himself in a "blind spot" where he would not be seen, looked through the rear window of the car. He testified that while so positioned he saw Rosario holding, and then showing a plastic bag—a "baggie"—to the other two persons in the automobile. The agent initially testified that the baggie appeared to contain a white-colored powder. Upon further examination, however, the agent modified his testimony and stated that the baggie actually contained a number of round lumps surrounded by some powder, the color of which could have been a "light tan or a light yellow or it could have been many different colors." At the time he observed the contents of the baggie, it was late in the evening and, evidently, very dark. Apparently there was no light on in the car.

As he showed the baggie to the other occupants of the car, Rosario noticed that they were being watched. Realizing that he had been observed, Agent Stromfeld,

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1 The codefendant, Harold Zafra, pled guilty and did not file an appeal.

who had earlier taken out his badge and gun, opened the door of the car and, with the help of other agents on the scene, arrested all three occupants. During the "pat down" of Rosario, as mentioned earlier, the agents found the plastic bag, which Rosario apparently had hastily tried to conceal.[2] This bag was eventually determined to contain cocaine.[3]

On cross-examination, defense counsel attempted to learn why the agents had been observing Rosario. While the witness acknowledged that the agents had followed Rosario from his home to the Vector Avenue address, the Government objected to defense counsel's attempt to ascertain the reasons why Rosario was being watched. Nor was the duration or extent of the apparent surveillance made known. The agent further testified that his arrest of Rosario was based on his one observation of what was taking place in the darkened car.

Since Rosario's consent to the search and the search itself closely followed his arrest without any significant intervening event, the crucial question in determining the propriety of all of these events is whether the arrest was made with probable cause.[4] If the arrest itself was

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2 The agent testified that he saw Rosario, as he started to get out of the car, put the hand in which he had been holding the baggie between his legs and that, when Rosario spread his legs for the "pat down," the bag fell from between his legs. Both of these observations, however, occurred after Rosario was already under arrest.

3 Rosario was indicted only for possession of the cocaine that was found in his apartment after the search, and not for the cocaine discovered during the "pat down" immediately after his arrest.

4 Probable cause to make an arrest, it has been held, "exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S. 98, 102 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949).

not proper, the evidence gathered as a result of the arrest would have to be excluded as being the fruits of an illegal arrest. *Dunway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Tucker*, 610 F.2d 1007 (2d Cir. 1979).

The district court, finding that the DEA agents had had Rosario "under surveillance that day concerning drug transactions" and had seen Rosario hold up a plastic bag containing a white powder, and that the secreted bag dropped from between Rosario's legs when he stood up, held that there was probable cause for the arrest. Such findings of fact, however, as limited as they are, are not borne out by the record.

A careful examination of the record reveals nothing that would explain why or for how long the DEA agents were watching Rosario. In fact, the record indicates no more than that Rosario had been followed for a short period immediately preceding his arrest. Even if that can be considered "surveillance" there was no evidence whatever as to why it was thought that he might be involved in "drug transactions." The sole testimony offered to prove that the substance in the plastic bag was a white powder was modified on cross-examination. Thus, it became apparent that the agent, to the extent that he was able to see at all into the darkened car, saw no more than Rosario holding a plastic bag, which the agent thought was filled with some light-colored round lumps. Finally, while the secreting of the bag between Rosario's legs when he saw the agents might have probable cause significance, it occurred after an armed arrest was in progress. *See United States v. Strickler*, 490 F.2d 378 (9th Cir. 1974); *United States v. Lampkin*, 464 F.2d 1093 (3d Cir. 1972); *United States v. Troutman*, 458 F.2d 217 (10th Cir. 1972). (This Court has indicated that the presence or absence of a drawn gun is

significant in determining whether an arrest has taken place. *United States v. Oates,* 560 F.2d 45 (2d Cir. 1977).)

Of course, a determination as to probable cause by the trial court is entitled to some weight. However, the instant situation involved a motion to suppress evidence obtained after an arrest had been made without a warrant, and not the granting of a warrant prior to arrest. Moreover, this Court need not defer to the findings of the trial court if the facts in the record reveal, as they do in this case, that the findings are inaccurate or unsupported. *See Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1973), *cert. denied*, 420 U.S. 927 (1975), *cert. denied*, 424 U.S. 956 (1976).

The question of whether probable cause exists to make an arrest in a situation such as the instant one has been addressed by this Court and by others on a number of occasions. In *United States v. Moon*, 351 F.2d 464 (2d Cir. 1965) (per curiam), it was held that an informer's tip that the defendant was selling narcotics, plus the observation by narcotics agents of the defendant transferring a glassine envelope to an individual, who thereafter fled, provided probable cause to make an arrest. Similarly, in *United States v. Comissiong*, 429 F.2d 834 (2d Cir. 1970), it was held that the combination of an informer's tip and the observation by agents of a suspicious "cellophane-type" package on the person of the defendant provided a sufficient basis to make an arrest. In reaching this conclusion, the court noted that "the informer's story sufficed to fill whatever lacuna the agents' observation had left." *Id.* at 836. In *United States v. Devenere*, 332 F.2d 160 (2d Cir. 1964). the combination of agents overhearing the defendant engage in a highly suspicious (drug related) conversation

and the observation of a glassine bag, provided probable cause for an arrest. *See United States v. Lee*, 501 F.2d 890 (D.C. Cir. 1974); *United States v. Canieso*, 470 F.2d 1224 (2d Cir. 1972); *Redmon v. United States*, 355 F.2d 407 (9th Cir. 1966). *See also United States v. Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974);[5] *United States v. Baltazar*, 477 F. Supp. 236 (E.D.N.Y. 1979).[6]

This question has also been addressed by the courts of New York State, where a consistent line of cases hold that the mere observation of the passing of glassine envelopes (even though they are a "telltale" sign of a narcotics transfer) is insufficient to establish probable cause. *See People v. Corrado*, 22 N.Y.2d 308, 292 N.Y.S.2d 648, 239 N.E.2d 526 (1968); *People v. Oden*, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975). *People v. Oden, supra*, held that such an observation by a police officer, even though taking place in a high crime area in which narcotics were known to be present, was inadequate. *See also People v. Bryant,* 37 N.Y.2d 208, 371 N.Y.S.2d 881, 333 N.E.2d 161 (1975); *People v. Davis*, 36 N.Y.2d 280, 367 N.Y.S.2d 256, 326 N.E.2d 818, *cert. denied*, 423 U.S. 876 (1975). Only when such an observation is accompanied by other solid

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5 In *United States v. Santana,* it was found that agents who had under surveillance a restaurant known as a meeting place where narcotics transactions took place, and who observed the defendant, whom they knew to be a major narcotics violator, twice enter the restaurant and emerge on each occasion carrying a brown paper bag (which the agents knew as a "hallmark" of the narcotics trade), had a sufficient basis under *Terry v. Ohio,* 329 U.S. 1 (1968), to stop the defendant and require identification.

6 In *United States v. Baltazar,* unlike the instant case, the arresting agent, before making the arrest, observed the defendant attempt to hide a clear plastic bag containing a white powder, as well as engage in other suspicious conduct.

evidentiary fact, such as evidence that "the defendant dropped or threw the envelopes, thereby evincing a consciousness of guilt upon seeing the approaching uniformed officer," have the New York courts found that a finding of probable cause may be made. *People v. Alexander*, 37 N.Y.2d 202, 204, 371 N.Y.S.2d 876, 877, 333 N.E.2d 157, 158 (1975).

In the instant action, not even the common allegation that the arrest took place in a high crime area known for narcotics transactions is present. *See United States v. Magda*, 547 F.2d 756, 759 (2d Cir. 1976) (Motley, J. dissenting), *cert. denied*, 434 U.S. 878 (1977).[7] What the record reveals, in essence, is that Rosario was arrested because an agent saw, as best he could in a dimly lit area, Rosario in possession of a light-colored, lumpy material contained in a plastic sandwich bag—not even the "telltale" glassine envelope. Such facts, standing alone, are simply insufficient to constitute probable cause for arrest.

It may be reasonable to assume that the agents had some grounds for following Rosario and conducting surveillance, if indeed they were carrying out those activities; it is also likely that the grounds related to a suspected drug transaction; and such grounds may have provided the "lacuna the agents' observations had left." *United States v. Commissiong*, *supra*, 429 F.2d at 836. However, no such evidence was ever introduced. The Government opposed allowing any testimony on this

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7 It should be remembered that this is not a stop and question case such as that presented in *United States v. Magda*, *supra*. *See United States v. Santana*, *supra*. Inquiring of Rosario as to what he had in the plastic bag would have been a lesser intrusion on his civil rights than drawing of a gun and shield and arresting him. *See Terry v. Ohio*, 392 U.S. 1 (1968).

point and the record is silent as to any reason why Rosario was being watched. Indeed, what is truly involved in this appeal is not whether an arrest was made without probable cause, but, rather, how little evidence the Government can introduce to justify a warrantless arrest and still survive a motion to suppress.

It is clear that the majority opinion, like the district court below, strains the factual findings to avoid the imposition of the exclusionary rule. This is understandable. After years of application, even the most vigorous proponents of the exclusionary rule can show no improvement in law enforcement practices. From personal observation, it appears that its major effect has been to either free guilty suspects or to elicit perjured testimony from law enforcement officials. Neither of these results is in the public interest. Strangely, however, the ardent civil libertarians show little interest in the realities of the application of the exclusionary rule, while pressing for its greater application. Caplan, *A Fifteen Year Journey Through a Tangled Thicket of the Law*, National Law Journal, September 22, 1980, at 33 (reviewing Y. Kasimar, POLICE INTERROGATION AND CONFESSIONS (1980)).

If the judicially created exclusionary rule is to be altered or revoked, it should be done directly and not by a case by case fanciful fact finding.

Since proof of probable cause for the arrest of the appellant was lacking, the motion to suppress should have been granted. Accordingly, the judgment of the district court should be reversed, and I must dissent from the opinion of this Court.

APPENDIX B—Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of December, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR ROSARIO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Victor Rosario,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Gerard L. Goettel, dissenting.

A poll of the active judges having been taken on the suggestion for rehearing in banc, and there being no majority in favor thereof, rehearing in banc is DENIED.

s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk